IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. 71-1465

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA
FINANCE CORPORATION,

Respondent.

PETITION FOR CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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In Propria Persona, Petitioner

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No. 71-1465

J. B. ROSENTHAL,

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vs.

ARKANSAS LOUISIANA
FINANCE CORPORATION,

Respondent.

ON PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

OPINIONS BELOW

The opinions below are set forth in the petition.

QUESTIONS PRESENTED

The questions presented are set forth in the petition.

STATEMENT

The facts presented are set forth in the petition.

ARGUMENT

I

IN ORDER TO AVOID A GROSS INJUSTICE THE SUPREME COURT SHOULD CONSIDER THE ISSUES PRESENTED, EVEN ASSUMING SUCH ISSUES WERE NOT RAISED BEFORE THE TRIAL COURT

Even if the questions presented in the instant petition were not raised at the trial court level, issues involving public policy may be considered for the first time on appeal. Mulligan v. Andrews, 211 F. 2d 28, 93 U.S. App. D.C. 375 (D.C. Cir., 1954); Gomez v. Williams, 420 F. 2d 1364 (10th Cir., 1970);

4 Corpus Juris Secundum 703, Appeal and Error §234.

Default judgments are a useful means of alleviating conjestion in the courts and thereby further the efficient administration of justice. Consequently, the continued, unimpaired, availability of default judgments is a matter of great public concern.

The reliability of default judgments in this regard is seriously threatened by the judgments under review in the instant petition. Even where a court has jurisdiction over a party, that court cannot, consistent with the Fourteenth Amendment, where a party defaults, grant greater or different relief than that specified in the complaint and prayer. For a court to do so would destroy the reliability of the default judgment procedure, since a party who choses to default would then be forced to do so at his peril.

The arguments presented in the instant petition involve the due process clause of the Fourteenth Amendment. Consideration of a question of this fundamental nature may be undertaken for the first time on appeal when necessary to serve the ends of substantial justice, and to prevent the denial of fundamental rights. Daugharty v. Gladden, 257 F. 2d 750, 758 (9th Cir., 1958); Founding Church of Scientology v. United States, 409 F. 2d 1146, 1164 (D.C. Cir., 1969); 5 Am. Jurisprudence 2d 34, Appeal and Error §549.

II

THE ISSUES RAISED IN THE INSTANT PETITION WERE RAISED, IN SUBSTANCE, BEFORE THE TRIAL COURT

Petitioner submits that the questions presented by the instant petition were, in substance, raised at the trial court level and at every other stage of the proceedings below. Petitioner, at all stages below challenged the personal jurisdiction asserted over petitioner by the Kentucky Court. To argue that a court lacks personal jurisdiction over a party is to argue that any purported exercise of that court's powers over such person would violate the due process clause of the Fourteenth Amendment.

The assertion that a court lacks personal jurisdiction is sufficiently broad so as to include the assertion that an exercise of jurisdiction in excess of a court's lawful authority violates due process.

The due process clause is violated where no notice appropriate to the matter to be tried is given to a party. Petitioner was never put on notice that a personal judgment would issue against him since the complaint in the Kentucky action sounded quasi in rem and specifically sought personal judgments only against defendants who were personally served with summons. It is an

undisputed fact that petitioner was never personally served with summons. See, Petition page 5, et. seq., and the Kentucky Complaint at Petition Appendix "F", page 30.

The Kentucky Court exceeded its jurisdiction by awarding, in a default matter, greater or different relief than that specified and sought in the complaint and prayer. An assertion that the Kentucky Court lacked personal jurisdiction altogether and that the Kentucky Court issued a judgment in violation of the Fourteenth Amendment includes the contention that due process was violated by a judgment issued in the excessive exercise of the Kentucky Court's jurisdiction. For that reason, and also because neither the courts below nor Respondent were misled, this Court should consider the issues presented in the instant petition.

III

THE DEFAULT ORDER AND JUDGMENT OF THE KENTUCKY COURT (PETITION APPENDIX "E", PAGE 24), IS NOT A CONSENT JUDGMENT, BUT ON THE CONTRARY IS A "TRUE" DEFAULT JUDGMENT

The judgment of the Kentucky Court is entitled, "Default Order and Judgment." (Petition Appendix "E", page 24.) That

judgment reads in material part as follows:

> "This cause coming on to be heard, and it appearing to the Court that the defendants named in the caption hereinabove, and each of them, have been duly served with Summons for a period of more than twenty (20) days last past and that defendants, and each of them, are now in default of the filing of any answer, motion of other pleading to the complaint filed herein as amended and the court being advised, IT BEING HEREBY ORDERED AND ADJUDGED AS FOLLOWS:" (Emphasis added.)

Despite the foregoing recital, it is an indisputable fact that petitioner was never personally served with summons. It is clear, moreover, that the referenced judgment is in fact a default judgment. Thus, the Kentucky Court, itself characterizes the judgment as a default judgment, as quoted immediately above.

The Superior Court In and For the County of Los Angeles,(California), determined that the Kentucky Court had acquired personal jurisdiction over Petitioner since an attorney (McCann), who had been hired by the general partner filed a demurrer to the complaint which was determined to be a general appearance according to Kentucky law. (See, Respondent's Brief In Opposition, page 5.) As set forth in

the opinion of the California Court of Appeals (Petition Appendix "B" -2 at page 17 thereof), Petitioner was not aware that the Kentucky Court's Default Order and Judgment Awarded a judgment in personam against him until approximately nine months after the Kentucky Court's Default Order and Judgment was entered.

Under these facts the Kentucky Court's Default Order and Judgment cannot be considered in the nature of a consent judgment. An attorney has no power to surrender substantial legal rights of his client in the absence of express authority. Himmelfarb v. U.S., 175 F. 2d 924, cert. den. 338 U.S. 860 (9th Cir., 1949). Attorney McCann may have been authorized by Petitioner to handle minor matters of procedure in the Kentucky action. However, McCann was never authorized to consent to a judgment and no court below found that McCann was ever authorized to consent to a judgment. The authority to waive a substantial right cannot be implied from the mere relationship of attorney and client. Bommarito v. Southern Canning Co., 208 F. 2d 56 (8th Cir., 1953). Accordingly, it is clear that Petitioner never consented to the Kentucky Court's Default Order and Judgment.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

J. B. ROSENTHAL

In Propria Persona,
Petitioner